

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 21, 2006

WILLIAM HOWELL STEELE, ET AL. v. RICHARD A. BERKMAN, M.D.

**Appeal from the Circuit Court for Davidson County
No. 00C-3084 Hamilton V. Gayden, Jr., Judge**

No. M2005-02935-COA-R9-CV - Filed March 14, 2006

This application for an interlocutory appeal concerns the waiver of Tennessee Code Annotated section 29-26-115(b)'s requirement that an expert witness in a medical malpractice case have practiced in a contiguous bordering state within the year preceding the date that the alleged injury or wrongful act occurred. The Circuit Court for Davidson County determined that the plaintiffs' expert had not practiced in a contiguous bordering state within the year preceding the injury, but granted the plaintiffs a waiver of the requirement. The Circuit Court subsequently granted the defendant permission to appeal to this Court pursuant to Tennessee Rule of Appellate Procedure 9. We concur with the Circuit Court that this is an appropriate case for an interlocutory appeal. Because the plaintiffs failed to demonstrate that the appropriate witnesses would not otherwise be available as required by Tennessee Code Annotated section 29-26-115(b), we reverse the Circuit Court's order denying the defendant's motion to strike the plaintiffs' expert.¹

Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Circuit Court Reversed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

E. Reynolds Davies, Jr. and John T. Reese, Nashville, Tennessee, for the appellant, Richard A. Berkman, M.D.

Al H. Thomas and Joshua David Thomas, Memphis, Tennessee, for the appellee, Julia Steele.

Al H. Thomas, Memphis, Tennessee, for the appellee, William Howell Steele.

¹The Tennessee Rule of Appellate Procedure 9 application and answer fully set forth the parties' positions and the material facts. Therefore, pursuant to Tennessee Rule of Appellate Procedure 2, we suspend the application of Tennessee Rule of Appellate Procedure 24, 25 and 29, and find oral argument to be unnecessary pursuant to Tennessee Rule of Appellate Procedure 35(c). *See Hammock v. Sumner Co.*, No. 01A01-9710-CV-00600, 1997 WL 749461 (Tenn. Ct.App. Dec. 5, 1997) (No Tennessee Rule of Appellate Procedure 11 application filed).

MEMORANDUM OPINION²

I.

William Howell Steele and Julia Steele filed this medical malpractice action against Dr. Richard A. Berkman (“Dr. Berkman”) on October 24, 2000.³ On January 24, 2001, Dr. Berkman filed a motion for summary judgment supported by his own affidavit. The plaintiffs responded by submitting the affidavit of Dr. Todd H. Wasserman (“Dr. Wasserman”), who opined that Dr. Berkman breached the requisite standard of care by failing to obtain a radiation oncology consult. The trial court determined that Dr. Wasserman’s affidavit created a genuine issue of material fact and denied Dr. Berkman’s motion for summary judgment. However, the plaintiffs subsequently withdrew Dr. Wasserman as an expert, and Dr. Berkman filed a motion to revise the order denying the motion for summary judgment. The plaintiffs then submitted the affidavit of Dr. Howard Ozer (“Dr. Ozer”), who also opined that Dr. Berkman breached the requisite standard of care by failing to provide radiation therapy following surgery. On December 15, 2004, the trial court permitted the plaintiffs to file an amended affidavit addressing several deficiencies in Dr. Ozer’s affidavit, but awarded Dr. Berkman sanctions in the form of attorney’s fees and ruled that Dr. Ozer would be the plaintiffs’ only medical expert.

Dr. Berkman subsequently discovered that, although Dr. Ozer had practiced in Atlanta, Georgia in early 1997, he had moved to Pennsylvania in March of 1997. Because Dr. Berkman first treated Mr. Steele in September of 1998, more than one year after Dr. Ozer moved to Pennsylvania, Dr. Berkman filed a motion to strike Dr. Ozer as an expert and to dismiss the plaintiffs’ claims on the grounds that Dr. Ozer had not practiced in a contiguous bordering state within the year preceding the date that Dr. Berkman first treated Mr. Steele as required by Tennessee Code Annotated section 29-26-115 (b). The trial court agreed that Dr. Ozer had not practiced in a contiguous bordering state within the year preceding the date of the alleged malpractice. Nevertheless, on October 10, 2005,

²Tenn. Ct. App. R. 10 provides:

The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion, it shall be designated “MEMORANDUM OPINION,” shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

³ The original complaint also named six other doctors and two hospitals as defendants. The claims against one of those defendants, Dr. Paul Moots, were the subject of a previous Tenn. R. App. P. 10 extraordinary appeal, *Steele v. Berkman*, No. M2001-02250-COA-R10-CV, 2002 WL 1800982 (Tenn. Ct. App. Aug. 7, 2002), and the court takes judicial notice of the facts set forth in that opinion.

the trial court waived the contiguous state requirement and denied the motion to strike. The trial court subsequently granted Dr. Berkman permission to appeal to this Court pursuant to Tennessee Rule of Appellate Procedure 9.

II.

Tennessee Code Annotated section 29-26-115 (b) provides:

No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection when it determines that the appropriate witnesses otherwise would not be available.

There is no dispute that Dr. Ozer left Georgia more than a year before Dr. Berkman first treated Mr. Steele and that Dr. Ozer thus fails to meet the contiguous bordering state requirement of Tennessee Code Annotated section 29-26-115(b). The sole question on appeal is whether the trial court erred in waiving the contiguous state requirement and allowing Dr. Ozer to testify as medical expert for the plaintiffs. Tennessee Code Annotated section 29-26-115(b) permits the court to waive the contiguous state requirement if the court determines that “the appropriate witnesses otherwise would not be available.” The appellate courts of this state have addressed the issue of waiver on at least three prior occasions.

In *Childress v. Bennett*, 816 S.W.2d 314, 316 (Tenn.1991), the plaintiff's expert was a Tennessee licenced physician who was doing a residency in Florida during the year prior to the plaintiff's injury. The Tennessee Supreme Court found a waiver of the contiguous state rule to be appropriate after determining that no other medical witnesses were available. Likewise, this Court has affirmed the waiver of the contiguous state requirement where the plaintiff submitted affidavits demonstrating that reasonable diligence had been exercised to find a witness who met the criteria of the rule. *Steele v. Ft. Sanders Anesthesia Group*, 897 S.W. 2d 270, 281 (Tenn.Ct.App. 1994). However, this Court has also affirmed the denial of a waiver where the plaintiffs' affidavits “were generalized and unspecific, and reflect only a cursory effort to find an appropriate expert from Tennessee or a contiguous border state.” *Rose v. HCA Health Services of Tennessee*, 947 S.W. 2d 144, 148 (Tenn.Ct.App.1996).

In this case, there is no proof regarding the availability of an appropriate expert from Tennessee or a contiguous state. Indeed, plaintiffs' counsel candidly conceded that he made no effort to find another witness because he thought Dr. Ozer met the contiguous state requirement. The plaintiffs have cited no case where the court has waived the contiguous state requirement without

any showing regarding the availability of other witnesses or the plaintiffs' efforts to find such witnesses. Accordingly, we hold that the contiguous state requirement cannot be waived in this case because the plaintiffs have failed to demonstrate that "the appropriate witnesses otherwise would not be available" as required by Tennessee Code Annotated section 29-26-115(b).

III.

The Tennessee Rule of Appellate Procedure 9 application for permission to appeal is hereby granted. The trial court's October 10, 2005, order denying Dr. Berkman's motion to strike is vacated, and the case is remanded to the trial court for entry of an order granting the motion to strike. The plaintiffs are taxed with the costs for which execution may issue.

WILLIAM B. CAIN, JUDGE